Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	ET Docket No. 93-266
Review of the Pioneer's	)	
Preference Rules	)	

To: The Commission

COMMENTS OF PAGEMART, INC.

PageMart, Inc., ("PageMart"), by its attorneys, submits these comments on the Commission's Notice of Proposed Rulemaking, FCC 93-477 (released October 21, 1993) ("NPRM"), which initiates a review of the pioneer's preference rules to assess the effect of the Commission's new authority to assign licenses by competitive bidding.[1/] PageMart is a rapidly growing, innovative paging company, dedicated to providing cutting-edge, low-cost services on a nationwide basis. Utilizing primarily private carrier paging channels, the company is a leader in the implementation of advanced telecommunications technologies, including narrowband personal communications services ("PCS").

1/ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387 (1993) (the "Budget Act"); Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking (FCC 3-455, released October 12, 1993).

I. THE COMMISSION SHOULD REPEAL THE PIONEER PREFERENCE RULES.

The pioneer preference rules were established as a means to ensure that those who created new technologies would at least be assured of obtaining an FCC license with which to introduce those technologies to the public. This guarantee of at least some access to the marketplace was viewed as an incentive for the development of new communications technologies.[2/]

With the advent of competitive bidding, innovators now have significant control over whether they obtain a desired license; they need only outbid other mutually exclusive applicants. Continuation of the pioneer preference system in a manner that not only assures the preference holder a license, but a free license as well (when others now have to pay for theirs), goes far beyond the Commission's rationale in adopting the pioneer preference and could result in serious competitive imbalances.

The most rational course would be to repeal the pioneer preference system in its entirety, both because a remedy for the original problem now is provided by auctions

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2/ NPRM at ¶¶ 5-6. Experience showed that the Commission's then-existing procedures for selecting licensees -- lotteries and comparative hearings -- reduced the likelihood that an innovator of a service or technology could obtain a license.

and, equally, because the preference system has proven to be less than efficacious. If any lesson is to be drawn from the narrowband and broadband PCS proceedings, it is that the enormous amount of Commission and applicant resources devoted to attempting to assess the competing technical claims of would-be pioneers would have been far better spent on any number of other, more productive pursuits. There simply is no longer any public interest basis to justify the continuation of this misallocation of resources.

II. IF THE COMMISSION CHOOSES TO RETAIN THE PREFERENCE SYSTEM, IT SHOULD SUBSTANTIALLY ALTER THE GOVERNING RULES.

Assuming arguendo that the Commission deems it appropriate to maintain some elements of the pioneer preference system, the "reward" must be adjusted to fit today's circumstances, and this adjustment must be applied both prospectively and retroactively.

A. The Commission's Rules Should Be Strengthened To Avoid Potential Abuses.

In the pending proceedings on reconsideration of the Commission's First Report and Order on narrowband PCS,[3/] PageMart and others have demonstrated that a significant potential for abuse exists because the rules do

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3/ See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, FCC 93-329, GEN Docket No. 90-314, ET Docket No. 92-100, released July 23, 1993.

not require pioneer's preference holders to build the systems for which they have been granted a preference.[4/] In brief, grantees could use their preferences to obtain scarce spectrum for existing services, or for other services that would not have qualified for a preference.[5/] At the very least, the Commission must require that all pioneer preference grantees, including those that have already received preferences, use their licenses solely for the development of the systems they propose in their preference requests, or face forfeiture of those licenses.

B. Licenses Awarded Pursuant To A Preference Should Be Limited To The Geographic Area In Which Experimental Operations Were Conducted.

Granting an uncontested license to a preference holder -- particularly a free license -- for a nationwide or regional system would allow grantees a windfall far beyond

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4/ See PageMart Petition for Reconsideration, filed September 10, 1993; PageMart Opposition to and Comments on Petitions for Reconsideration, filed October 25, 1993; and PageMart Reply to Opposition of Mobile Telecommunication Technologies Corporation ("Mtel") to Petitions for Reconsideration, filed November 4, 1993.

The Commission has incorporated these submissions into this docket, and will consider the concerns raised therein to the extent that they address generically the pioneer's preference rules. NPRM at ¶ 10, note 12.

5/ Indeed, Mtel's recently filed application for a narrowband PCS license -- which it alleges is based on its pioneer's preference -- actually appears to be totally unrelated to the technical proposal that formed the basis of that preference.

anything contemplated when the rules were adopted. The goal of the preference system was to reward innovators by providing them with assurances that they would receive a license, not to grant them a huge financial advantage over their competitors. For those preference holders who truly have made an outstanding technological advance, Congress has provided a patent system that ensures a substantial reward; there is no rational basis for the Commission to augment that system by bestowing on pioneer preference winners a separate prize worth tens of millions of dollars.

Therefore, if the Commission retains the pioneer's preference system, it should limit the license awarded pursuant to the preference to the principal geographic area in which the innovation was tested. That would ensure a rational balance between the reward and the investment made. Moreover, this limitation should apply to existing preference holders; there is no public interest basis for affording them a windfall any more than future grantees.

C. The Commission Should Require Pioneer Preference Grantees To Pay For Their Licenses.

1. The Commission Has Broad Authority To Implement Its Pioneer's Preference Program, Including The Imposition Of Charges For Pioneer's Preference Licenses.

Pioneer's preferences were designed to provide a regulatory certainty for an innovator; they were not intended to result in a financial windfall. Other applicants for licenses will already be disadvantaged by a grantee's ability to capitalize on the certainly of its license. They would be further handicapped -- without any benefit to the public -- if they were forced to shoulder a substantial financial burden that is not imposed on preference grantees.

Congress has made clear that the Commission has broad discretion to modify its pioneer's preference system in light of the establishment of the auction authority.[6/] This discretion includes the authority to change the nature of the prize (a license) or the conditions precedent for receipt of the prize. There is nothing in either the Communications Act of 1934, as amended, or the Budget Act that requires that a pioneer preference winner receive a free license in the context of a system that awards licenses by auctions.

6/ See Budget Act, § 6002(a); H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., at 485 (1993).

Thus, for example, the Commission could require that a preference holder bid like any other applicant for a particular license, but perhaps give the preference holder a discount (e.g., 5%) if the preference holder submits the winning bid. A variation on this proposal would afford the preference holder the option of avoiding the auction process by voluntarily paying a price set by the Commission that would approximate what the license would have drawn at auction.[7/] Either way, the preference holder obtains a significant benefit -- the certainty of obtaining a license (albeit having paid essentially full price), or the right to compete for a license with the assurance of a discounted price -- without substantially skewing the competitive balance in the marketplace.

2. Requiring Mtel To Pay For Its Preference Would Not Be Inequitable.

The NPRM suggests that it somehow would be "inequitable" to require Mtel to pay for its license,[8/] without any particular explanation as to the precise nature or degree of this inequity. Nor, more significantly, does

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[7/] Under this option, the pioneer would pay a charge equivalent to the average of the winning auction bids for comparable markets, using, e.g., a per-"pop" formula. See PageMart Opposition and Comments on Petitions for Reconsideration at 10; PageMart Reply to Mtel Opposition at 3.

[8/] NPRM at ¶ 18.

the NPRM address what would seem to be the only truly relevant question: would the overall public interest be disserved by requiring Mtel to pay for its license.

Certainly the Commission has the administrative discretion to alter the nature of the prize to be awarded to Mtel.[9/] Not even licensees acquire permanent rights against a subsequent change in law or regulation, and to date, Mtel is at best only an applicant.[10/] As the Supreme Court noted in FHA v. Darlington:[11/]

> Federal regulation of future actions based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it . . . Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.

Under this unambiguous standard, Mtel has no basis for complaint. Indeed, if equities are to come into play, it would be grossly unfair to other service providers for the Commission not to require Mtel to pay for its license. As Mtel itself concedes, it has already benefitted greatly from its pioneer's preference, having been quite successful

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9/ See generally SEC v. Chenery, 332 U.S. 194 (1947).

10/ See Multi-State Communications, Inc. v. F.C.C., 728 F. 2d 1519, 1526 n. 12 (D.C. Cir. 1984).

11/ 358 U.S. 84, 91 (1958).

in obtaining funding and other contractual arrangements because of the certainty that it will receive a license.[12/] The award of a free license, in addition to the benefits already conferred, would be completely unfair to Mtel's competitors and contrary to the policy underlying the preference system.

CONCLUSION

PageMart agrees with the Commission's conclusion that the newly enacted competitive bidding authority undermines the basis for the pioneer's preference program, and urges the Commission to abolish the system. Alternatively, if the Commission decides to retain the preference system, it should amend its rules to avoid potential abuses and eliminate the inequity that results under the new status quo established by the Budget Act. In either case, the Commission should ensure that existing grantees do not receive benefits from their preference

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12/ See Opposition of Mtel to Petitions for Reconsideration of Paging Network, Inc. and Pacific Bell at 3-4.

grants far in excess of anything contemplated by the Commission when it adopted the pioneer preference system.

Respectfully submitted,

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Certificate of Service

I, Ginger S. Pribble, do hereby certify that copies of the foregoing Comments of PageMart, Inc. were served via first-class, postage prepaid mail, on this 15th day of November, 1993, to the parties listed below.

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